DePaul Law Review

Volume 30
Issue 4 *Summer 1981*

Article 7

Ban on Communication with Potential and Actual Class Members Voided as Unconstitutional - Bernard v. Gulf Oil Co.

Mary Dempsey

BAN ON COMMUNICATION WITH POTENTIAL AND ACTUAL CLASS MEMBERS VOIDED AS UNCONSTITUTIONAL—*BERNARD V. GULF OIL CO.*

In what could be a landmark decision of significant impact on class action litigation, the United States Supreme Court unanimously affirmed a well-reasoned decision by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, sitting en banc,[1] had struck down a class action order explicitly modeled after a provision in the *Manual for Complex Litigation*.[2] The challenged order barred prospective communications between (i) parties and their counsel and (ii) actual and potential class members.[3] Reversing a

1. Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980).

2. MANUAL FOR COMPLEX LITIGATION § 1.41, at 188-89 (4th ed. 1977) (supplement to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1969-1980)) [hereinafter cited as MANUAL].

3. Specifically, the order provided:

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication

year old decision by one of its own panels,[4] the Fifth Circuit, in a twenty-one to one decision, ruled that such a plenary prohibition was an unconstitutional prior restraint of free speech in violation of the first amendment to the Constitution and Rule 23 of the Federal Rules of Civil Procedure.[5]

Before the Fifth Circuit's decision, numerous federal district courts had adopted similar gag orders, occasionally in the form of local district court rules.[6] These rules were designed ostensibly as prophylactic measures to prevent potential class action abuses. These restrictive orders proliferated, even though the Supreme Court had ruled on five previous occasions that

---

file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S. Ct. 1684, 48 L.Ed. 2d 187 (1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3d Cir. 1975), *cert. denied*, 420 U.S. 969, 95 S. Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

619 F.2d at 464 n.4.

4. Bernard v. Gulf Oil Co., 596 F.2d 1249, *vacated*, 604 F.2d 449 (5th Cir. 1979).

5. 619 F.2d at 463.

6. *See, e.g.*, the following local federal district court rules: S.D. FLA. 19(8); N.D. GA. 221.2, 221.3; D. MD. 20; W.D. WASH. 23(g).

some communication between class counsel and potential class members clearly constituted constitutionally protected speech.[7]

Since the Fifth Circuit's decision, some district courts have either reversed standing restrictions on class action communications or denied motions for such restraints.[8] In other jurisdictions, however, local ban orders remain untouched. For example, one court concluded that, notwithstanding *Bernard*, the ABA ethical standards bar such communications.[9]

Quite appropriately, the United States Supreme Court granted a writ of certiorari in *Gulf Oil Company v. Bernard*.[10] Unfortunately, the Court affirmed the Fifth Circuit on the basis of Rule 23 of the Federal Rules of Civil Procedure, rather than on the basis of the first amendment. Thus, the Court's opinion failed to clarify important issues in class action litigation.[11] Indeed, the decision adds further confusion to an area of law that is already plagued by inconsistent practices of questionable constitutionality.

FACTS AND PROCEDURAL HISTORY

In April, 1976, Gulf Oil Company and the Equal Employment Opportunity Commission (EEOC) entered into an extrajudicial conciliation agreement relating to Gulf's alleged racial discrimination at its Port Arthur, Texas plant.[12] The agreement provided for conciliation of alleged discriminatory practices and for back pay to 643 present and former black employees in return for the employees' agreement to release Gulf from any possible claims of employment discrimination.[13] In May, 1976, six present or retired black

---

7. *See In re* Primus, 436 U.S. 412 (1978); United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1968); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

8. Kilgo v. Bowman Transp., Inc., 88 F.R.D. 592 (N.D. Ga. 1980); Garside v. Everest & Jennings, No. S-80-82 MLS (E.D. Cal. 1980).

9. Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981).

10. 449 U.S. 1033 (1980).

11. Gulf Oil Co. v. Bernard, 101 S.Ct. 2193 (1981).

12. *Id.* at 2195.

13. *Id.* Gulf solicited releases from the black employees through letters like the following:

May 1, 1976

Dear (name of employee):

In line with its continuing policy of providing equal opportunity to all employees and annuitants, Gulf has recently entered into an agreement with the United States Equal Employment Opportunity Commission and the U.S. Department of the Interior. As part of the written agreement, Gulf has identified certain employees and annuitants to whom back pay will be offered in settlement of past discrimination claims, even though Gulf does not admit to having discriminated against anyone. You are a member of this group of employees and annuitants, and should you accept the terms of this offer, you will immediately receive by certified mail $1,163.34 less legal deductions for social security, if applicable, and income tax. The amount of your back pay was figured according to your plant seniority date, and very probably will not be the same as that of anyone else presented an offer under the agreement.

Because this offer is personal in nature, Gulf asks that you not discuss it with others. Gulf will likewise respect your complete privacy by not disclosing the amount

employees of the Port Arthur plant brought a class action against Gulf under Title VII of the Civil Rights Act of 1964, charging a variety of discriminatory practices.[14] According to Gulf, the issues in the suit were almost identical to those provided for in the conciliation agreement.[15]

Prior to answering, Gulf filed a request asking the district court to enter an order restricting communications by parties and their counsel with actual or potential class members because of some allegedly improper communications between class counsel and putative class members.[16] In an unsworn brief, Gulf claimed that one of the plaintiffs' attorneys had attended a meeting with black Gulf employees who were potential class members. According to Gulf, the attorney urged the group not to sign releases sent to them in connection with the conciliation agreement negotiated between Gulf and the EEOC and allegedly represented that he could recover twice as much for them in the class action.[17] Plaintiffs' attorneys denied the charges.[18]

The district court, on May 28, 1976, entered a temporary order imposing the requested restraint.[19] The plaintiffs challenged the constitutionality of

---

> offered you to other employees or annuitants. Even though both you and Gulf may feel that you have not been discriminated against in any way by Gulf, the money is available to you upon acceptance. To help you make a decision, Gulf wants you to understand that the only condition for accepting back pay is that you sign a written statement releasing Gulf from any possible claims of employment discrimination occurring before the date of your release, including any future effects or alleged past practices. Of course, in all other ways you will retain full rights to administrative and legal processes.
>
> Enclosed you will find a written "Receipt and General Release". You may immediately receive your back pay check by completing all questions on the Receipt and General Release, signing before a Notary Public and returning it in the self-addressed envelope provided. Services of a Notary Public will be provided at no charge by calling. . . . Once you have returned the signed Receipt and General Release, you should receive your check by mail within 7 to 10 days.
>
> If you feel that you cannot respond because you do not understand Gulf's offer, you may contact . . . during normal business hours, to arrange an interview with a government representative who will answer your questions.

Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae at 1a-2a, Gulf Oil Co. v. Bernard, 101 S. Ct. 2193 (1981).

14. 101 S. Ct. at 2195-96. The class consisted of all black employees now employed or formerly employed by Gulf Oil Company at its plant in Port Arthur, Texas, and all black applicants for employment at Gulf Oil Company who have been rejected for employment at the company. *Id.* at 2195.

15. 619 F.2d at 464. Plaintiffs sought injunctive and declaratory relief and damages. They charged that Gulf discriminated against blacks in hiring and job assignments, employed discriminatory tests, paid inequitably, employed racially discriminating promotion and progression practices, denied blacks training and seniority, and discriminatorily discharged and disciplined blacks. Further, they alleged that the union had condoned Gulf's practices. 596 F.2d at 1263 (Godbold, J., concurring and dissenting).

16. 101 S. Ct. at 2196.

17. *Id.*

18. 596 F.2d at 1254.

19. 619 F.2d at 464. Judge Steger, sitting in Chief Judge Fisher's absence, entered the original order that prohibited all communication without exception. 596 F.2d at 1258.

the order,[20] but on June 22, the Chief District Judge of the Eastern District of Texas, without entering findings of fact or requiring Gulf to prove its unsworn charges, rejected plaintiffs' arguments and entered a modified order explicitly modeled on the suggested order in the *Manual*.[21] With some exceptions, the modified order imposed a pervasive ban on communication between all parties, their counsel, and potential or actual class members.[22] A significant exception to the ban allowed Gulf to continue communications with class members and to solicit releases in exchange for back pay awards under the terms of the conciliation agreement.[23]

On July 6, 1976, plaintiffs' counsel requested that the court allow counsel and their clients to communicate with members of the proposed class.[24] Filed with the motion was a notice that plaintiffs proposed to distribute to Gulf's black employees, alerting them that the lawsuit was an alternative to the Gulf/EEOC conciliation agreement and urging them to contact an attorney.[25] The deadline for accepting the conciliation offer expired August 8, 1976.[26] In a single sentence order on August 10, the district court denied plaintiffs' motion.[27]

Following entry of the order, the district court granted summary judgment in response to defendants' motion and dismissed the complaint in January, 1977.[28] On appeal, plaintiffs challenged both the summary dismissal and the district court's order restricting communications. On June 15, 1979, a panel of the Fifth Circuit reversed the grant of summary judgment

---

20. 619 F.2d at 464. Plaintiffs argued that the order was an unconstitutional prior restraint and that the district court lacked authority to issue it.

21. *Id.*

22. *See* note 3 *supra*.

23. 101 S. Ct. at 2197. *See* note 3 *supra*, at (3) & (7). For a copy of one of the solicitation letters, see note 13 *supra*.

24. 101 S. Ct. at 2198.

25. *Id.* The proposed notice read as follows:

> ATTENTION BLACK WORKERS OF GULF OIL
>
> The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. *IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN.* These lawyers will talk to you *FOR FREE:* [names and addresses of respondents' counsel].
>
> These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Co.*, which was filed in Beaumont Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.
>
> Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.
>
> AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.

101 S. Ct. at 2198 n.6.

26. *Id.* at 2198.

27. *Id.*

28. *Id.* at 2198 n.8.

and remanded the case, but upheld the communication ban as a permissible exercise of the district court's discretionary power to control class actions.[29]

Plaintiffs subsequently asked the entire Fifth Circuit to reconsider the panel's decision, and a rehearing en banc was granted.[30] Upon reconsideration, the court of appeals adopted the earlier panel's reversal of the lower court's summary judgment ruling and adopted the remand.[31] By a vote of twenty-one to one, however, the full court rejected the panel's position on the communication ban. The Fifth Circuit concluded that the district court's order, restricting communications by named plaintiffs and their counsel with actual or potential class members, violated the first amendment because the ban was an unconstitutional prior restraint of speech.[32] Furthermore, the court declared that the ban violated Rule 23 of the Federal Rules of Civil Procedure.[33]

On December 8, 1980, the United States Supreme Court granted a writ of certiorari[34] to decide the question of whether a district court judge presiding over a class action may constitutionally restrict plaintiffs or their counsel from discussing the case with potential or actual class members in order to prevent abuse of the class action device.[35] A unanimous Supreme Court held

---

29. 596 F.2d 1249, 1254 (5th Cir. 1979). Following entry of the order the defendants had moved to dismiss the complaint. The court ordered that the motion be treated as a motion for summary judgment and granted summary judgment in January, 1977. *Id.* On appeal, the plaintiffs challenged dismissal by the district judge of plaintiffs' Title VII and § 1981 claims, the district court's application of laches to the Title VII claim, and the propriety of the order restricting the parties' communication with members of the putative class. A Fifth Circuit panel held that the district court erred in dismissing the individual Title VII claims of two of the named plaintiffs and erred in dismissing the class claims (Part I), *id.*; erred in holding that the statute of limitations totally barred plaintiffs' § 1981 claims (Part II), *id.* at 1256; improperly applied the doctrine of laches, finding unreasonable delay and prejudice on plaintiffs' part where there was none (Part III), *id.* at 1258; and correctly exercised its power to control class action litigation by entering the order restricting communications (Part IV). *Id.* at 1262.

30. 604 F.2d 449 (5th Cir. 1979).

31. 619 F.2d at 463. The Fifth Circuit adopted parts I, II, and III of the panel opinion. *See* note 29 *supra*.

32. 619 F.2d at 466-78.

33. *Id.* at 478.

34. 449 U.S. 1033 (1980).

35. The question for review as presented by Gulf, read as follows:

> Whether during the pendency of a class action, a United States district court can constitutionally enter an order limiting certain communications between plaintiffs or their attorneys and potential or actual class members not yet formal parties to the action, in order to prevent actual and potential abuse of the class action device.

Petition for Writ of Certiorari at II, Gulf Oil Co. v. Bernard, 101 S. Ct. at 2193 (1981). The respondents did not accept Gulf's formulation of the issue, and instead submitted the following:

> Whether the district court's several orders restraining communication by plaintiffs and their attorneys with members of the potential class in this civil rights action violated the Constitution or the Federal Rules of Civil Procedure, where there were no findings of any improper conduct by plaintiffs or their counsel, the uncontradicted evidence demonstrates no misconduct by them, and no evidentiary hearing was ever held.

Brief For Respondents at *i*, Gulf Oil Co. v. Bernard, 101 S. Ct. 2193 (1981). The Court granted certiorari to the question in Gulf's petition.

that in imposing the gag order the district court had abused its discretion under the Federal Rules of Civil Procedure. The Court found that the order was inconsistent with the general policies embodied in Rule 23 of the Federal Rules of Civil Procedure and was not based on either a clear record or specific findings of abuse.[36] Unlike the Fifth Circuit, the Supreme Court confined its decision to the issue of what authority the district courts have under the Federal Rules of Civil Procedure to impose sweeping bans on communications in class actions. Consequently, the Court did not address the constitutional issue of whether orders such as the one entered by the district court are prior restraints on speech and thus forbidden by the first amendment.[37]

Although the Supreme Court's decision remedied the abuse of judicial discretion in the *Bernard* case, its holding was a narrow one.[38] The Court had the opportunity to issue a decision of significant impact on the course of class action litigation. The decision it rendered, however, left the door open for the continued imposition of communication bans by district courts and the attendant potential for prior restraint of constitutionally protected speech.

Communication Restraints in Class Actions

The class action is a device that allows one representative "to step forward and sue on behalf of all,"[39] thereby aggregating substantially similar claims and prorating the cost of litigation among numerous litigants. The device originated at common law and was codified in the federal district court system in 1937 with the adoption of Rule 23 of the Federal Rules of Civil Procedure[40] by the United States Supreme Court. The class action provides a forum for those who would otherwise find it virtually impossible to litigate their rights individually.

Not every case is appropriate for treatment as a class action. The prerequisites that must be satisfied for a case to be certified as a class action under Rule 23 are complicated and extensive.[41] In view of the factors a court must

---

36. 101 S. Ct. 2193 (1981).

37. "[P]rior to reading any constitutional questions, federal courts must consider nonconstitutional grounds for decision." 101 S. Ct. at 2199.

38. 101 S. Ct. at 2202 n.21.

39. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 691 (1941). The class suit is an affirmative technique, over and above joinder, for bringing all litigants into a case and, if successful, "making recovery available to all." *Id.* at 688. Its apparent purposes include judicial economy, uniformity of decision and provision of forum. Schorr, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215, 220 (1976).

40. On December 20, 1937, the Supreme Court adopted the Federal Rules of Civil Procedure pursuant to the Act of June 19, 1934, ch. 651, 48 Stat. 1064. 302 U.S. 783 (1937).

41. Rule 23 provides in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

weigh in deciding whether to certify a class, it is not unusual for a class certification question to be decided a year or more after a class action complaint is filed.[42] In the interim, the parties may engage in limited discovery to crystallize the issues to be litigated, examine the nature of the class claims, determine the estimated class size, and examine the adequacy of the class representative.

During the period between the filing of the complaint and the decision on class certification, the class counsel's duties to the class members are unclear. Because of the obligation to represent the interests of absent class members,

---

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

* * *

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. . . .

42. Interestingly, while many class suits are filed, few are ever fully litigated. "Most class actions for damages are either dismissed before trial or settled, and injunctive decrees may be negotiated, even if liability is adjudicated." *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1373-74 (1976). A statistical study of class actions brought within the District Court for the District of Columbia showed that 44 cases out of 81, or 55%, were disposed of on a motion to dismiss or for summary judgment for the defendant. Three of the 81 cases, or 3.7%, resulted in judgment for the defendant after trial. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1136-37 (1974). *See also*, Furth & Burns, *The Anatomy of a Seventy Million Dollar Sherman Act Settlement—A Law Professor's Tape-Talk With Plaintiff's Trial Counsel*, 23 DEPAUL L. REV. 865, 880 (1974) (litigator observes that most antitrust class actions are settled).

class counsel must treat them as clients and avoid compromising their rights. At the same time, however, contact initiated by class counsel in some instances can be viewed as unethical direct solicitation of clients, especially if the purpose or effect of the contact is to discourage a decision to drop out of the class.[43] Moreover, unauthorized direct or indirect communications from counsel or a party might confuse actual and potential class members, perhaps leading to circumstances that might have an adverse effect on the class' rights.[44]

To prevent these potential abuses of the class action process, several federal district courts[45] have adopted local rules permitting orders that restrict, in whole or in part, communications between all counsel to an action and any potential or actual class member who is not a formal party to the action. Most of these local rules are modeled on a suggested order in the *Manual For Complex Litigation*.[46] Additionally, some federal judges sitting in districts where there are no such local rules have issued similar orders restricting class action communications.[47]

To further complicate matters, Disciplinary Rule 7-104 (DR 7-104) of the American Bar Association Model Code of Professional Responsibility forbids an attorney to communicate on the subject of representation with a party he knows to be represented by counsel in that matter without the prior consent of the party's lawyer, or to give advice to a person not represented by counsel if the interests of such person are, or might come in conflict with those of his client.[48] For example, in a decision rendered after the Fifth Circuit's *Bernard* decision, the District Court for the Western District of Kentucky[49] read DR 7-104 to mean that defense counsel must treat even potential class members as clients of the class counsel and therefore, must refrain from communicating with potential class members from the date the complaint is filed.[50]

---

43. Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981).

44. Schorr, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215 (1976).

45. *See* note 6 *supra*.

46. *See* note 2 *supra*.

47. *See, e.g.*, Weight Watchers of Phila., Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972); Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981).

48. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1979). The Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969. The Disciplinary Rules are mandatory in character. They "state the minimum level of conduct below which no *lawyer* can fall without being subject to disciplinary action." *Id.* Preamble at 1. (emphasis added). Standing alone, the Code has no force and effect; it serves only as a guide. "Enforcement of legal ethics and disciplinary procedures are local matters securely within the jurisdictional prerogative of each state and the District of Columbia." ABA Comm. on Ethics and Professional Responsibility Informal Op. 1420, at 5 (1978).

49. Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981).

50. *Id.* at 722-23. *Impervious Paint* involved consolidated multiple-defendant civil antitrust actions that proceeded as a class action. At the time of class certification, the court entered a standard gag order designed to prevent potential abuses of class actions. Like the order in the MANUAL, *supra* note 2, an authority upon which the court relied heavily, the order required court approval prior to contact of class members by parties or counsel. Certain defendants then

ANALYSIS

While the district court in *Bernard* never attempted to explain why it imposed a plenary limitation on class communications, the court of appeals concluded that the limitation was based on suggestions in the *Manual*.[51] These suggestions were designed to prevent the possible solicitation and misrepresentation abuses noted above. It was due to the pervasive influence of the *Manual* in espousing such preemptory restrictions, and the absence of other rulings on the constitutionality of the *Manual*'s suggested restriction,

---

moved to vacate that order citing *Bernard* as support. The court agreed with the *Bernard* decision and the defendant's argument that the order was broader than allowed by the first amendment, and vacated the communications ban. 508 F. Supp. at 722. Thereafter, plaintiffs' counsel became aware that representatives of one of the defendants had begun contacting its own customers who were also class members. Defendants' purpose was to discuss the suit and the class members' part therein. The court dismissed plaintiffs' unsupported allegations that these contacts were actually threats of commercial retaliation directed against class members. The court did focus, however, on the substance and the origin of these contacts, ultimately finding that defense counsel had run afoul of DR 7-104. Customer contacts included explanation of the class notice, reminders of the need to affirmatively opt out if the member decided not to remain in the class, advice that evidentiary proof of claim would be required in order to recover and advice that a class member who did not opt out might be subject to discovery. *Id.*

The court accepted as undisputed that defendants' *counsel* neither contacted any class member nor instructed the corporation's representatives to do so. Nevertheless, the court concluded that the counsel must have had full knowledge of their clients' activities and, in dereliction of their duty under DR 7-104, did not advise against this activity. *Id.* at 723. As a result, the court ordered that any of the class members who had been contacted by the defendant and had subsequently elected to opt out of the class must be restored to the class, be informed of defendant's "impropriety", and be given an additional period within which to make a decision to remain or again opt out.

The district court distinguished *In re* Primus, 436 U.S. 412 (1978), saying that the advancement of political beliefs and issues was the issue in *Primus* but not in *Impervious Paint*. The court then analogized the case to Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), finding that the contacts were made for pecuniary gain. Each of those cases, however, involved contacts with class members made by lawyers. Further, the disciplinary rules cited by the court as its authority for sanctioning the defendant, apply only to *lawyers*. *See* note 48 *supra*. The contacts in *Impervious Paint*, in contrast, were made by corporate representatives. Yet, on the basis of "circumstantial indications", the court was willing to tie counsel for the defendants to the alleged improper acts of its clients so that the court could use these authorities to apply sanctions. 508 F. Supp. at 723.

Finally, and perhaps most distressingly, the district court made a weak attempt to distinguish *Bernard*, a decision which it had previously cited as its authority for vacating a gag order based on the MANUAL, *supra* note 2, only to replace it with an even broader gag order based on the considerations of DR 7-104. The district court, while previously reading *Bernard* to hold that blanket gag orders in class actions constitute unconstitutional prior restraints of speech, harmonized that ruling by finding that the "exceptional circumstances" and likelihood of "direct, immediate and irreparable harm" in this case allowed it to enter a prior restraint in conformity with *Bernard*. 508 F. Supp. at 723. In *Bernard*, however, the Fifth Circuit went through a long and careful analysis of the facts in the case, weighing first amendment rights of free expression against the potential for abuse. In *Impervious Paint* the district court merely assumed that because some of the contacted class members had elected to opt out of the class they had therefore been forced to do so. The court cited no evidence for its assumption. "[The] contacts appear to have been quite effective, since an extraordinary percentage of the opt-outs are [the contacted] customers." *Id.*

51. 619 F.2d at 466.

that the Fifth Circuit addressed the constitutionality of the district court's order.[52]

When the district court ordered the entry of a gag order modeled after the order in the *Manual*, it balanced the interest in unrestrained communication against the interest in the orderly administration of justice.[53] The Fifth Circuit rejected this balance, however, and invalidated the restriction because (i) the rule constituted a prior restraint on freedom of speech; (ii) the speech at issue was constitutionally protected; and (iii) the restraint failed to meet the previously articulated standards governing restriction of constitutionally protected expression.[54]

The Supreme Court struck down the order merely because it represented an abuse of judicial discretion. Consequently, the Court never reached the question of the constitutionality of imposing plenary communication bans in class action suits. Because of its unwillingness to examine such bans in light of the first amendment's prohibitions against prior restraints, the Court has effectively acquiesced to their continued use. Indeed, the Court, in one of its two brief references to the first amendment, merely observed "that the order involved serious restraints on expression" and the Court counseled "caution on the part of a District Court in drafting such an order."[55]

A careful reading of the Supreme Court's decision suggests that the district court's single major transgression was merely its adoption of the order suggested by the *Manual* without specific findings of abuse.[56] The Supreme Court's opinion in *Bernard* reflects a surprising tolerance for prior restraints in class actions. The Court's admonition that the district court should have weighed the need for a limitation on speech against the potential for interference with the rights of the parties is merely a license for district courts to continue issuing such bans on meager findings of abuse.

In a footnote, the Court explained that "[f]ull consideration of the constitutional issue should await a case with a fully developed record of possible abuses of the class action device."[57] Ironically, the Court had a perfect record of abuse before it in *Bernard*. The abuse was not solicitation of plaintiffs or of the class by plaintiffs' counsel. Rather, the abuse in *Bernard* sprang directly from the district court's use of its own order to prevent potential class members from receiving information about the existence of a

---

52. *Id.* at 466-67.

53. MANUAL, *supra* note 2, Part I.

54. 619 F.2d at 467-74.

55. 101 S. Ct. at 2202.

56. 101 S. Ct. at 2201. It is not surprising that the district court entered its order without findings or even proof of abuse. The MANUAL encourages courts to adopt local rules that ban all unapproved communication by formal parties or their counsel with potential and actual class members. In short, the MANUAL encourages blanket communication bans in class actions to be the rule in all courts. Under this theory, once a class action is filed, only proposed written communications, submitted to and approved by court order, may pass to potential and actual class members. Thus, communication becomes the exception, not the rule. MANUAL, *supra* note 2, Part I, § 1.41.

57. 101 S. Ct. at 2200 n.15.

lawsuit designed to adjudicate their rights.[58] Furthermore, that order was entered not on proof that plaintiffs or their counsel had engaged in abusive practices, but on the mere *possibility* of abuse—a possibility that was never substantiated or proven.[59]

Moreover, the order was one-sided. The order enjoined plaintiffs and their counsel from informing potential class members of an alternative to Gulf's conciliation agreement. Gulf, however, was allowed to continue to solicit releases of all discrimination claims from those same class members.[60] Indeed, on Gulf's own motion the district court, without findings, modified its original blanket ban to allow Gulf to continue contacting class members regarding its settlement offer. Yet, when the plaintiffs requested permission to contact those same individuals to inform them of an alternative to Gulf's offer, the district court effectively quashed the class action by denying plaintiffs' motion two days after the deadline for class members to accept Gulf's offer.[61]

The Supreme Court could not have been presented with a clearer pattern of abuse or a more blatant restriction on speech than it had in *Bernard*. The best way to analyze what the Supreme Court failed to do is to examine the Fifth Circuit's reasoning. Ironically, when the Fifth Circuit declared the district court's gag order an unconstitutional prior restraint, it was following precepts of constitutional law embodied in past Supreme Court decisions.

Prior Restraints on Free Speech

The order entered by the district court in *Bernard*[62] and the type of order set forth in the *Manual*[63] are classic examples of what the Supreme Court has consistently held to be prior restraints on speech. A prior restraint is generally defined as a formal prohibition on speech "imposed in advance of utterance or publication."[64] Over two hundred years ago Blackstone cited the protection of freedom of speech as essential to the viability of a free state and as the rationale for protecting citizens against prior restraints.[65] Because

---

58. 619 F.2d at 464. The district court waited until two days after the deadline for accepting Gulf's conciliation agreement to inform plaintiffs and their counsel of the denial of their motion to inform class members that an alternative to signing the agreement existed. *Id.*

59. 619 F.2d at 464.

60. *See* note 13 *supra.*

61. *See* note 57 *supra.*

62. *See* note 3 *supra.*

63. *See* note 2 *supra.*

64. *See* Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV., 519, 520 (1977).

65. Blackstone stated:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

4 W. BLACKSTONE, COMMENTARIES* 151-52 (emphasis in original).

prior restraints bar information and ideas from reaching the public, the Supreme Court has interpreted them as one of the primary evils against which the first amendment was directed.[66]

The underlying theory is that a prior restraint is a more restrictive alternative than subsequent punishment.[67] It has been said that a system of prior restraints, in contrast to a subsequent punishment, is likely to bring under government scrutiny a wider range of expression; is likely to repress communication; is more likely to be applied than suppression through criminal process; lacks the procedural safeguards of the criminal justice system; and generally tends toward excesses like all forms of censorship.[68]

Foremost among the objections to prior restraints is the tremendous discretion given to one individual.[69] Further, while the unconstitutionality of a statute may be raised as a defense by one guilty of its violation after the fact,[70] a litigant who disobeys an injunction is guilty of contempt and is

---

66. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976); Carroll v. Princess Anne, 393 U.S. 175, 181 (1968). The Court has interpreted the first amendment to provide special protection against specific court orders that prohibit the publication of particular information. Although prior restraints are not unconstitutional per se, they are viewed as "bearing a heavy presumption against . . . constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

67. The Court has reasoned:

> [A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (emphasis in original).

In situations where a prior restraint is imposed in advance of a final judicial determination on the merits, the Court has said that the restraint must "be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." Freedman v. Maryland, 380 U.S. 51, 59 (1965). But the temporary nature of a restraint does not remove from the party wishing to impose it the burden of showing justification for the prior restraint. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

68. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970).

69. In Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931), the Supreme Court struck down a Minnesota statute, the operation and effect of which the Court said constituted the essence of censorship. Under the statutory scheme, a newspaper or periodical could be suppressed for publishing charges of official misconduct against public officials. Any further publication of such charges would constitute a contempt and thus a restraint upon the publisher. The publisher's only recourse was to satisfy a court of the validity of the charges and of his intention in publishing them. *Id.* at 712-13.

In Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), a publisher of books and pamphlets, which were banned as immoral by a state commission, was not entitled to notice and hearing before his publications were labled as objectionable. Moreover, the system contained no provision for judicial review of the commission's determination. The Court held that this system of prior administrative restraint was actually a form of "informal censorship" which was constitutionally proscribed. *Id.* at 70-71. Later, in Freedman v. Maryland, 380 U.S. 51 (1965), the Court noted that "[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court" to protecting free expression. *Id.* at 57-58. Further, the Court said, the censor's determination may become final if judicial review is not readily accessible. *Id.*

70. In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Supreme Court held that a law subjecting the right of free expression in public places to the prior restraint of a license,

precluded from raising constitutional invalidity as a defense in subsequent proceedings.[71] The Supreme Court has called this an "immediate and irreversible sanction."[72] Whereas the threat of subsequent criminal or civil sanctions for violation of a statute chills speech,[73] those sanctions are only imposed after the violation and after all avenues of judicial review have been exhausted. A prior restraint, on the other hand, "freezes speech"[74] before it is expressed.

The Supreme Court in *Southeastern Promotions, Ltd. v. Conrad*[75] explicitly recognized that governmental action need not totally inhibit expression to constitute a prior restraint. If a restriction on one's chosen manner of expression significantly restricts or impairs communication, it may constitute a prior restraint by inhibiting speech notwithstanding the availability of alternative means of communication.[76] Moreover, a prior restraint forces a delay in publication or communication until there is a judicial determination of the validity of the information to be disseminated.[77] Depending upon the nature of the speech, first amendment rights are often lost or prejudiced by delay.[78]

---

without narrow standards is unconstitutional, and a person faced with such a law may ignore it and exercise his first amendment rights. The Constitution will not deny one who has disobeyed a statute the right to challenge its constitutionality. *Id.* at 151.

71. As one commentator noted: "[A] court order must be obeyed until it is set aside . . . . [P]ersons subject to the order who disobey it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional." Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 552 (1977).

In Walker v. City of Birmingham, 388 U.S. 307 (1967), the Supreme Court held that civil rights marchers who had been enjoined by an Alabama circuit court from participating in street parades were not justified in disobeying the injunction prior to its orderly judicial review. Even though the Court saw the breadth and vagueness of the injunction as subject to constitutional question, the proper way to raise the question was to apply to the state courts for modification or dissolution of the injunction. The Fifth Circuit has applied this rule of law to a court order forbidding publication of evidence taken at a hearing. United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973). In *Dickinson*, the Fifth Circuit held that the district court had power to punish reporters who flagrantly disregarded its orders even though the order itself violated the first amendment.

72. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

73. *Id.*

74. *Id.*

75. 420 U.S. 546 (1975).

76. "Whether petitioner might have sued some other, privately owned, theater in the city for the production is of no consequence . . . . '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Id.* at 556 (quoting Schneider v. State, 308 U.S. 147, 163 (1939)).

77. *See* Carroll v. Princess Anne, 393 U.S. 175, 184-85 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963).

78. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 609 (1976) (Brennan, J., concurring).

Gulf actually argued in its brief to the Supreme Court that delay is meaningless when critical communications are involved. "If after the . . . order is entered, the court fails to allow critical communications to reach absent class members, the appellate courts can correct the error upon final appeal." Brief for the Petitioners at 21 n.15, Gulf Oil Co. v. Bernard, 101 S.Ct. 2193 (1981). Gulf cited Oswald v. McGarr, 620 F.2d 1190 (7th Cir. 1980), to support its rather

Using a definition originally articulated by the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*[79] the Fifth Circuit in *Bernard* described prior restraint as a "predetermined judicial prohibition restraining specified expression."[80] The appeals court in *Bernard* articulated four features that distinguish prior restraints from limitations on free speech imposed by subsequent restraints: (1) origin: a prior restraint is generally judicial rather than legislative in origin;[81] (2) purpose: a prior restraint has as its purpose suppression of communication;[82] (3) means of enforcement: punishment by contempt, absent the traditional safeguards of the criminal justice system, is the intended means of enforcement;[83] (4) means of constitutional challenge: those who choose to disobey a court order cannot raise its constitutional invalidity as a defense.[84] Every one of these features was manifest in the district court's order in *Bernard,* and each of these characteristics embraces vices that counsel against the continued imposition of prior restraints in class actions.

Origin

The order in *Bernard* was "undeniably judicial in origin."[85] Not only did the order originate from the trial court, but it also placed the judicial administration of a crucial aspect of the suit in the hands of the judge. Along with ruling on class certification[86] and discovery matters prior to trial, a trial judge decides through promulgation of the order what communication, if any, should be restricted. The problem that the Fifth Circuit saw in the judicial nature of the order is that it placed tremendous discretion in one

---

remarkable assertion. In *Oswald*, the Seventh Circuit refused to vacate a district court order approving a notice that detailed a settlement offer to individual subclass members. Unlike *Bernard*, the class had already been certified. Furthermore, the order in *Oswald* informed class members that they could accept a settlement as an alternative to remaining in the class. *Id.* at 1193. In *Bernard*, the district court's order prevented potential class members from learning that a possible class action was an alternative to the settlement offered to them. Furthermore, Gulf, by citing *Oswald* implies that any prejudicial orders entered in this litigation can be corrected "on review of the final judgment." *Id.* This litigation was filed in 1976. It still has not reached trial. In fact, no class has been certified because plaintiffs were prevented from forming one. Without a class there will never be a trial, much less a final judgment to appeal. If, indeed, final judgment is ever reached, there is little hope that an appellate court could effectively remedy a wrong done six years ago to a group of individuals who released their employer from all discrimination claims because they did not realize there was an alternative way to proceed. To suggest, as Gulf does, that these individuals would not be harmed by this delay is to ignore the realities of this case.

79. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).
80. 522 F.2d at 248.
81. 619 F.2d at 467-68.
82. *Id.* at 468.
83. *Id.* at 468-69.
84. *Id.* at 469-70.
85. *Id.* at 468.
86. FED. R. CIV. P. 23(c)(1).

individual to censor specific communications.[87] At least one commentator has suggested that recognizing one individual as a censor leads to the inescapable conclusion that some communication will be suppressed.[88] In the *Bernard* litigation the district judge exercised his powers of censorship through the restriction order only once. That single exercise, however, effectively terminated the class suit's existence and removed a viable alternative for Gulf's black employees.[89]

Purpose

Clearly, the purpose of the district court's order was to suppress both direct and indirect communication between counsel or parties and the actual or potential class members.[90] As the Fifth Circuit observed, however, it is far less objectionable to punish the few who abuse rights of speech after they break the law than to stifle the rights of all in anticipation of the possible misdeeds of a few.[91]

The events in *Bernard* exemplify the inherent evil of preemptory suppression. Because of the factual similarities of *Bernard*, *NAACP v. Button*, and *In re Primus*,[92] the Fifth Circuit concluded that the communication suppressed by the district court order in *Bernard* would be protected by the holdings in those cases.[93] The possible solicitation of funds by the NAACP was discounted by the court because plaintiffs' counsel received no compensation from class members for their services.[94] Moreover, there was no possibility that Gulf would solicit opt out requests from the plaintiffs because *Bernard* was a Rule 23(b)(2) class action.[95] Finally, the Fifth Circuit observed that Gulf had failed to prove its allegations that the plaintiffs' attorneys had misrepresented the "status, purposes and effects" of the action.[96]

The degree to which a potential class member is fully apprised of his legal rights when confronted with the possibility of joining a class suit is subject to many variables. Often the individual class member runs the risk of making a

---

87. 619 F.2d at 468.

88. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955). By virtue of the institutional framework in which he operates, the function of the censor is to censor. The author calls it a "professional interest in finding things to suppress." *Id.* at 659. Blackstone expressed similar fears when he said that "[t]o subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government." 4 W. BLACKSTONE, COMMENTARIES *152.

89. *See* note 57 and accompanying text *supra*.

90. *See* note 3 *supra*.

91. 619 F.2d at 468.

92. *Id.* at 472.

93. *Id.* at 476.

94. *Id.* at 472-73.

95. *Id.* at 476.

96. *Id.* In his concurring opinion, Mr. Justice Tjoflat noted that Gulf produced only unsworn allegations of misconduct against one of the attorneys for the class and those allegations were denied by the named attorney under oath. *Id.* at 480 (Tjoflat, J., concurring).

hasty or uninformed decision to either join the class or not perhaps based upon one-sided information. Recently, the Second Circuit recognized this risk when it observed that communications with class members "which are factually or legally incomplete . . . will surely result in confusion and adversely affect the administration of justice."[97]

The communication ban entered by the district court in *Bernard*, however, which presumably was intended to aid the class members, actually denied them full disclosure of their rights. Effectively, the order denied the class its right to choose an alternative to the conciliation agreement.[98] Recognizing this, the Fifth Circuit emphasized that the choice between the lawsuit and accepting the conciliation agreement "was for each black employee to make," and not to be made by the district court.[99]

In contrast, the Supreme Court merely observed that the objectionable scope of the order was illustrated best by the district court's refusal "to permit mailing of the one notice [plaintiffs] submitted for approval."[100] The Court failed to recognize the tremendous import of the message that was censored by the district court's order. This failure, coupled with the Court's refusal to examine the constitutionality of the order, portends a continuation of the use of censorship in class action litigation.

The Fifth Circuit faced the issue of abuse of the class action squarely and recognized that constitutional rights cannot be held in abeyance in the belief that something might happen in the future.[101] Otherwise, the "immediate, and irreparable damage" exception to the rule against prior restraints articu-

---

97. Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2d Cir. 1980).

98. On July 6, 1976, the plaintiffs and their counsel, in compliance with the order of June 22, moved the district court for permission to communicate with putative members of the class so as to advise them of the existence of a lawsuit as an alternative to signing the conciliation agreement negotiated by the EEOC and Gulf. The employees had until August 8, 1976, to decide whether to accept that agreement. The district court waited until August 10 to deny plaintiffs' motion. 619 F.2d at 464. On paper, of course, the orders allow parties and their counsel, with prior court approval, to communicate with class members. In Great Western Cities, Inc. v. Binstein, 476 F. Supp. 827 (N.D. Ill. 1979), Judge Bua found that the requirement of prior court approval of communications "impose[d] no particular hardship" on the parties, implying that the entire process involves no time delay. *Id.* at 836. The action by the district court in *Bernard* is evidence, however, that this requirement may indeed result in fatal delay. 619 F.2d at 470. *See* note 77 *supra*.

99. 619 F.2d at 477.

100. 101 S. Ct. 2201. The Fifth Circuit observed that even as a subsequent restraint, the order entered by the district court was constitutionally invalid due to its vagueness and overbreadth. 619 F.2d at 477 n.33.

101. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 567 (1976); New York Times Co. v. United States, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring) (prior restraint of the Pentagon Papers).

If there is no evidence of misrepresentation, the purpose of gag orders becomes irrelevant and they do nothing more than place an unnecessary restriction upon the parties and their counsel as well as upon the first amendment rights of the class members. Further, if an order restricting communication is entered in a class action it has the added effect of disguising improper solicitation or misrepresentation that occurred earlier in the litigation and that might not otherwise be revealed if all communication is stifled.

lated by Mr. Justice Stewart in *New York Times Company v. United States*[102] would be deemed a rule, not an exception.

Enforcement

Both the Fifth Circuit and Gulf agreed that the district court's order was intended to be enforced through the contempt power of the court.[103] It is the "punishment by contempt" attribute of a prior restraint that distinguishes it from a criminal statute forbidding some expression.[104] A contempt citation has an "immediate and irreversible" effect,[105] while a judgment when a statute is violated is subject to the due process safeguards of the criminal justice system, including appellate review.[106]

The Fifth Circuit suggested three alternatives to contempt: (i) removal of the offending attorney as class counsel; (ii) denial or withdrawal of class certification; or (iii) removal of the offending plaintiff as class representative.[107] The Fifth Circuit rejected each of these, however, because none were available for use against defendants and their counsel. Thus, the Fifth Circuit concluded that contempt was the proper sanction.[108]

The Fifth Circuit also recognized that it generally is the "lack of procedural safeguards associated with . . . prior restraints"[109] that is the central reason for their unpopularity with the courts. Whether an order is a prior restraint does not turn solely on whether the sanction is contempt or removal of counsel, but on the order's impact on constitutional rights. Lack of procedural safeguards, vagueness, and overbreadth, regardless of the sanction, are clearly elements that militate against the validity of prior restraints.

No Means of Constitutional Challenge

Interwoven in the Fifth Circuit's discussion of the defenses available to one who violates a prior restraint was an analysis of the direct and immediate impact of a prior restraint. In fact, under the court's reasoning, the two are inextricably linked; a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense. Thus, the prior restraint had an immediate and irreversible sanction.[110]

---

102. 403 U.S. at 730. *New York Times* involved the publication by the *New York Times* and the *Washington Post* of the Pentagon Papers that revealed United States government activities which led to the Vietnam War. The attorneys for the government argued that the publication of this information while American troops were still engaged in combat in Vietnam endangered the war effort. The Court rejected the government's argument. *See* note 127 and accompanying text *infra*.

103. 619 F.2d at 468-69. The text of the order did not specify the means of enforcement.

104. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975).

105. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

106. *Id.*

107. 619 F.2d at 468 n.13.

108. *Id.* at 468-69.

109. *Id.* at 469.

110. 619 F.2d at 469.

The Seventh Circuit disagreed with this reasoning in *Chicago Council of Lawyers*, holding that "[t]he validity of court rules . . . can be challenged by one prosecuted for violating them . . . ."[111] The court based this on a distinction in that circuit between actions taken by the court in its legislative role or rule-making capacity, and actions taken in its adjudicative role.[112] The Fifth Circuit has yet to recognize this distinction between court functions.[113]

Therefore, while it is arguable that the sanction may not always be irreversible, it is nonetheless true that a violator is still subject to criminal contempt proceedings.[114] Moreover, in the event the prior restraint is eventually lifted, the immediacy of the restricted speech is lost.[115] As the Fifth Circuit observed, this loss of impact is "irremediable."[116]

Indeed, the district court's delay in ruling on the plaintiffs' motion to communicate with the class until August 10, 1976 illustrates this point. Not only did the court order completely cut off dialogue between the plaintiffs and their fellow employees, but it did so at a critical time—when the putative class members were considering whether or not to accept the Gulf/EEOC conciliation agreement.[117] Conceivably, some of those employees were not even aware that litigating their grievances with the class was an alternative to signing the agreement, thus highlighting the Fifth Circuit's observation that "[f]ragile First Amendment rights are often lost or prejudiced by delay."[118]

The Speech At Issue Was Constitutionally Protected

While it is clear that a restraint of the type espoused by the *Manual* is a prior restraint, it does not mean that the restraint is ipso facto unconstitutional. To date, the Supreme Court has refused to hold that a prior restraint can never be employed.[119] The Court has carved out a narrow category of permissible prior restraints. The order entered by the district court in *Bernard*, however, cannot be included among that group.

---

111. 522 F.2d at 248.

112. *Id.*

113. The Eastern District of Louisiana, which is in the Fifth Circuit, has accepted this distinction. *See* Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 789 (E.D. La. 1977).

114. Criminal contempt is punitive and serves to vindicate the court's authority. It does not terminate upon compliance with the order. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); *In re* Timmons, 607 F.2d 120 (5th Cir. 1979).

115. *See* note 77 and accompanying text *supra*.

116. 619 F.2d at 469 (quoting A. BICKEL, THE MORALITY OF CONSENT 61 (1975)).

117. 619 F.2d at 469-70.

118. 619 F.2d at 470. *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976); note 54 *supra*.

119. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

In *Near v. Minnesota ex rel. Olson*,[120] the Supreme Court stated that first amendment rights are not "absolutely unlimited,"[121] and listed, in dictum, three exceptional cases in which the government might limit them by "previous restraint": (i) to prohibit statements during a time of war which hinder the war effort or endanger troops; (ii) to censor obscene publications which offend the "primary requirements of decency"; and (iii) to protect the "security of the community life" from incitements to violence or violent overthrow of the government.[122]

Today, the most common exception to the general rule that prior restraints are unconstitutional is the restraint imposed upon expression that is arguably obscene. In *Freedman v. Maryland*,[123] the Court held that constitutionally protected materials may be temporarily restrained for the purpose of screening out obscenity prior to public distribution. The Court attached the caveat, however, that the restraint be conducted under procedural safeguards designed to minimize the danger of extreme or permanent censorship.[124] One commentator suggests that the Court's willingness to tolerate temporary prior restraints on arguably obscene material does not undermine its basic concern for the public's right of immediate access to information of a political nature.[125]

The exception to the rule against prior restraints is also currently invoked when direct and immediate harm to life or national security is involved. Yet, when in *New York Times Co. v. United States*[126] the Supreme Court held that the Pentagon Papers, which detailed the United States government's role in the Vietnam War, could be published, it rejected the government's objections that to do so would imperil national security. The government, the

---

120. 283 U.S. 697 (1931).

121. *Id.* at 716.

122. *Id.* Chief Justice Hughes cited Schenck v. United States, 249 U.S. 47 (1919), as support for the "nation at war" and sedition exceptions. The obscenity exception was unsupported. One commentator has suggested that these exceptions are obscure and based on little authority. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 661 (1955).

123. 380 U.S. 51, 58 (1965).

124. In *Freedman*, the Court stated that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), the Court explained that:

> "[A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is [constitutionally] unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Id. at 560 (emphasis in original).

125. *See*, Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 543 (1977).

126. 403 U.S. 713 (1971).

Court reasoned, failed to show that publication would surely and immediately result in grave danger to the nation.[127]

Five years after the *New York Times* decision, Chief Justice Burger, writing for the majority in *Nebraska Press Ass'n v. Stuart*,[128] reiterated that first amendment rights are not absolute and rejected the notion of banning prior restraints completely.[129] Justice Brennan, in his concurring opinion, took issue with the inference in the majority's opinion that prior restraints might sometimes be justified to prevent pretrial publicity. The majority's approach, as Justice Brennan viewed it, threatened to broaden the doctrine of prior restraint to its pre-*New York Times* status.[130] While it is true that the doctrine allows for some balancing of interests where the likelihood of very grave harm exists, Chief Justice Burger's language was more general in nature, possibly reflecting the majority's reluctance to prohibit prior restraints in all cases.[131]

The order entered by the district court in *Bernard* does not qualify as an exception under any of these Supreme Court decisions. Because the Supreme Court based its *Bernard* decision on nonconstitutional grounds, it has avoided, for the present, examining whether class action gag orders are prior restraints. Whether the Court will further broaden the narrow category of exceptions remains to be seen.

The Fifth Circuit concluded that the *Bernard* restraint fell within none of the exceptions allowing prior restraints and declared the order unconstitu-

---

127. *Id.* at 714. Professor Litwack observes, however, that the Supreme Court has twice denied certiorari to cases involving injunctions barring the disclosure by a former member of the Central Intelligence Agency of information which, in the view of the Fourth Circuit Court of Appeals, was highly sensitive to the national defense. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). Professor Litwack points out that despite the Court's rejection in *New York Times* of the notion that the government's right to protect its internal secrets is superior to the public's right to receive available political information of potential importance save in extraordinary situations, the Fourth Circuit successfully applied a lesser standard of possible impact on national interest in upholding the injunctions. Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 545 n.119 (1977).

128. 427 U.S. 539 (1976).

129. *Id.* at 570. *Nebraska Press* involved a court order banning pretrial publicity about a grisly multiple murder. The Court held that the burden of justifying the prior restraint in this case was not met, especially since the information restrained by the order was part of the public court record and the order itself was vague and overbroad. *Id.* at 567-68.

130. Justice Brennan based his position on his reading of the *New York Times* decision: "[t]he exception [to the rule against prior restraint is] to be construed very, very narrowly: when disclosure 'will *surely result in direct, immediate, and irreparable damage* to our Nation or its people.' " *Id.* at 593 (Brennan, J., concurring) (quoting New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., joined by White, J., concurring))(emphasis in original).

131. The Chief Justice stated:

> [W]e need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

427 U.S. at 569-70.

tional. The communication interdicted by the challenged order in *Bernard* involved solicitation of potential class members to join in racial discrimination suits in lieu of accepting an extra-judicial conciliation of the dispute. Since none of the attorneys were to receive compensation from class members for their services, this was precisely the type of communication found by the Supreme Court to be constitutionally protected in *In re Primus* and *NAACP v. Button*.

While solicitation of class members in general has been condemned by the Supreme Court as an abuse of Rule 23 of the Federal Rules of Civil Procedure,[132] the Court has modified those rulings when the solicitation was made by nonprofit organizations that engage in litigation as a vehicle for political expression as well as a means for communicating useful information to the public. *In re Primus*,[133] and its predecessor, *NAACP v. Button*,[134] are two of the Court's clearest pronouncements in this area. In *Button*, the National Association for the Advancement of Colored People (NAACP), a nonprofit organization, litigated and financed lawsuits aimed at desegregating public schools. In so doing, it represented minority parents and school children who had been approached about the possibility of litigating their rights by the NAACP itself.[135]

In *In re Primus*, the nonprofit American Civil Liberties Union (ACLU), advised a group of women of their legal rights resulting from their sterilization, which was a condition precedent for them to receive public medical assistance. In particular, an ACLU attorney represented to one woman the availability of free legal assistance from the organization.[136] In both decisions, the organizations soliciting litigants stood to receive little or no pecuniary gain for representing these individuals.[137] In each case, the Court balanced the State's interest in regulating the activities of the legal profession against the first amendment's protection of one's fundamental right "to obtain meaningful access to the courts."[138] The Court has held that the value of political expression and associational freedoms may not be abridged by

---

132. Solicitation is an effort by counsel to specifically seek out persons willing to have a class action instituted in their name. The Supreme Court has criticized such conduct because it has the possible effect of "a one-sided presentation" that encourages "speedy and perhaps uninformed decision making . . . ." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978). Further, the Court has observed that "[a] lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income." *Id.* at 461 n.19.

133. 436 U.S. 412 (1978).

134. 371 U.S. 415 (1963).

135. *Id.* at 421.

136. 436 U.S. at 415-16.

137. *Id.* at 414-15; 371 U.S. at 420-21. *See* note 131 *supra*.

138. 436 U.S. at 426 (citing United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971)); 371 U.S. at 438.

broad regulations designed to curb the abuses inherent in solicitation of class suits which litigate different claims altogether.[139]

Like *Button* and *Primus*, *Bernard* involved civil rights issues, the lawyers had no direct financial stake in the case, and the solicitation was aimed at providing access to the courts. Under the circumstances, the Fifth Circuit correctly concluded that the communications barred by the challenged order were protected expressions which called into play "the full panoply of first amendment safeguards against prior restraint."[140]

The Restraint Met None of the Standards Governing Restrictions on Constitutionally Protected Expression

Beyond the fact that the *Bernard* restraint did not fall within any of the narrowly defined exceptions to the rule against prior restraints, the Fifth Circuit, after surveying the Supreme Court's decisions in this area, concluded that the restraint met none of the requirements imposed by the Court on those who seek to justify prior restraints. First, the order was not aimed at preventing direct, immediate, and irreparable damage. Second, it was not the least restrictive means of doing so. Finally, there were no procedural safeguards.[141]

---

139. 436 U.S. 412, 426 (1978); 371 U.S. 415, 438 (1963). *See also* United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1 (1964). In all of the above cited cases, the groups in question (legal defense attorneys and labor unions) functioned as service organizations for their members, the persons being solicited. The purpose behind the soliciting group's activities, one commentator suggests, was to increase its members' ability to achieve common interests. *See* Schorr, *Class Actions: The Right to Solicit*, 16 SANTA CLARA L. REV. 215, 225 (1976). Schorr also noted:

> On the one hand, the group provided the increased access to the courts which solicitation would promote and which the group desired; on the other, it stood ready to protect its members from abuses of solicitation. It was in the association's own self interest to provide quality legal services and to assure that its members were not subjected to fraudulent practices . . . . [T]he group *itself* provided the protection and regulation that was the essence of the interest asserted by the state.

Id. (emphasis in original).

140. 619 F.2d at 473. Gulf based its case on unsubstantiated charges of abuse. In its brief to the Supreme Court, Gulf presented its view of the competing constitutional values at stake in the litigation. To Gulf, the interests were the constitutionality of a court's authority to enter an order "recommended by the nation's most experienced jurists and designed to insure against specific abuses" of the class action versus "generalized first amendment concerns of parties who have submitted to the court's jurisdiction." Brief for the Petitioners at 28-29.

The plaintiffs' claims were hardly generalized concerns. Regardless, Gulf saw them as unimportant because, in attempting to distinguish *In re Primus* and *NAACP v. Button*, Gulf inexplicably stated: "[t]he order here did not interfere with any constitutional right of access to the courts since the order was entered during ongoing litigation to manage a complicated class action that had begun to feel the pressures of abuse." *Id.* at n.29. If the action had begun to feel such pressures, it is clear from the record that the abuse was not emanating from the plaintiffs. Furthermore, Gulf's statement assumes that no right of access was hindered because all potential and actual class members had already made a decision whether or not to join the litigation. That clearly was not the case.

141. 619 F.2d at 474.

The Fifth Circuit held that this order was not brought within any of these exceptions. On the basis of the facts before it, the Fifth Circuit concluded that the order arose not as a result of any immediate need, but out of the "general context of the administration of justice and the particular context of Rule 23."[142] Mere interest in the "proper administration of justice," however, does not authorize the judiciary to impose "any blanket exception to the first amendment."[143]

The district court's purpose in entering the order in *Bernard* was the prevention of class action abuses. The *Manual* adheres to the same theory of prevention. As the Fifth Circuit pointed out, however, the frequency and effect of genuine abuses in class actions is nowhere collected in any empirical data.[144] Further, the *Manual* itself expressly recognizes that abuse of the class action is an exception and not the rule.[145] The *Manual*'s intent is to anticipate and prevent such "infrequent occurrences before they happen."[146] Clearly, the district court's entry of this prophylactic measure where, as here, the potential abuse was never proven,[147] was improper in light of the requirement that a prior restraint is only justified in exceptional circumstances and upon a showing of "direct, immediate and irreparable harm."[148]

In addition, there was no showing in *Bernard* that reasonable alternatives that would have had a lesser impact on free expression were unavailable.[149] Further, a prior restraint must be narrowly drawn. In particular, the Fifth Circuit criticized the breadth of the gag order[150] and the requirement that parties and counsel petition the court for approval prior to communicating with the class.[151] Finally, the Fifth Circuit was especially critical of the order's failure to meet the last exception to the rule against prior restraint requiring procedural safeguards. The court indicated that there was no evidence of abuse, no way to test the potential abuse premise, no findings of particular abuses present or threatened, and no conclusion of law.[152]

---

142. *Id.* at 474.

143. *Id.* (quoting Rodgers v. United States Steel Corp., 508 F.2d 152, 163 (3d Cir. 1975)). In *Rodgers*, the court held that the fair and orderly administration of justice does not mitigate the general presumption against prior restraints. 508 F.2d at 163. *See also* note 123 *supra*.

144. 619 F.2d at 476.

145. The MANUAL provides:

> It must be noted, however, that, generally, the experience of the courts in class actions has been favorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they support the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order.

MANUAL, *supra* note 2, at 31.

146. 619 F.2d at 476.

147. *Id.*

148. *Id.*

149. *Id.*

150. "The order . . . suppresses essentially everything . . . ." *Id.* *See* 619 F.2d at 477 n.33.

151. 619 F.2d at 477. *See also* note 57 and accompanying text *supra*.

152. 619 F.2d at 477. While these deficiencies are criticized in only one portion of the Fifth Circuit's order the Supreme Court found them to be a sufficient basis upon which to build its entire opinion.

IMPACT

Unlike the Fifth Circuit, the Supreme Court confined itself to a decision that condemned the district court's abuse of discretion in misusing Rule 23 of the Federal Rules of Civil Procedure.[153] The Court observed that the district court had used the order to extinguish communication at a critical point for the black employees in the class action and that the order was based on nonexistent and unsubstantiated grounds.[154]

Content with those findings, the Supreme Court refused to broaden its review to examine the dangers of plenary restraints on speech within the class action vehicle.[155] If it had, the Court would have had no choice but to follow the Fifth Circuit's reasoning and invalidate the order entered in *Bernard* as unconstitutional. The *Bernard* gag order was squarely struck down by the Fifth Circuit because that court recognized what the Supreme Court did not—that the order was not only vague, overbroad, and lacking in procedural safeguards, but most importantly, it interfered with constitutionally protected speech.[156]

If the Supreme Court had rendered a constitutional decision, the opinion would have had the effect of striking down those local district court rules that restrict communication in class actions because most local rules are virtually identical to the district court's order in *Bernard*.[157] Each of those local rules is an attempt by the district courts to manage class litigation from afar. The continued use of the rules represents a complete disregard by those courts for the unique factual and legal characteristics endemic to every class and to every class action.

A careful reading of the *Manual*'s suggested Rule 1.41, upon which most of the local rules are based, reveals that even after class certification all parties and their counsel are forbidden, without prior court approval, to communicate "with any potential or actual class member not a party."[158] In other words, class counsel may not communicate with class members they are supposed to represent without prior court approval. The implications of this broad ban are staggering. While it is quite likely that most courts would not forbid routine communication between counsel and the class, the approval requirement still inhibits crucial contact between attorney and client. Without filing a proposed communication with the court for approval, the class member is the only one who may initiate contact.

The order suggested by the *Manual* and adopted by the district court in *Bernard* provides that no communication protected by a constitutional right

---

153. 101 S. Ct. at 2201.

154. *Id.* at 2201-02.

155. 101 S. Ct. at 2199. In dicta, however, the Court, perhaps recognizing that its decision in *Bernard* would not resolve but rather add to the confusion in this area, observed: "the mere possibility of abuses does not justify routine adoption of a communication bar that interferes with the formation of a class . . . ." *Id.* at 2202.

156. *See* notes 91-95 & 131-38 and accompanying text *supra*.

157. *See* notes 3, 6 *supra*.

158. MANUAL, *supra* note 2, at 187. *See also* note 3 *supra*.

may be forbidden by the ban as long as the court receives a copy of the communication within five days after its occurrence.[159] It is clear that such a provision is mandated by the Supreme Court's holdings in *Button* and *In re Primus*.[160] But this provision, standing alone, cannot insure that the holdings of those decisions will be followed. The history of the *Bernard* litigation at the district court level suggests the contrary.[161]

The communication at issue in *Bernard* fell squarely within the constitutional parameters established in *Button* and *In re Primus*. Consequently, plaintiffs' counsel should have been able to communicate with the class, subject only to the order's requirement that they file with the court a copy or summary of the communication "five days *after* such communication."[162] Instead, the district court subjected the communication to before-the-fact scrutiny, ultimately insuring the nearly total defeat of the class action.[163]

Both the Fifth Circuit and the Supreme Court recognized that the district court had misused the gag order. The Fifth Circuit, however, based its holding on constitutional grounds while the Supreme Court confined itself to a strict reading of Rule 23 of the Federal Rules of Civil Procedure. While each court attacked in some way the *Manual*'s ban on communication, neither court discussed why there is no need for the *Manual*'s suggested restraint. All of the abuses that the rule is supposed to prevent can be avoided without resort to an undesirable prior restraint.

Even without the gag order, attorneys for both the class and the defendants are bound by Supreme Court decisions regarding solicitation and by the Canons of Ethics that prohibit misrepresentation. As *NAACP v. Button* and *In re Primus* make clear, solicitation on behalf of a bona-fide, nonprofit organization that pursues litigation as a vehicle for effective political expression and association is protected by the first amendment.[164] Those holdings should be read in light of *Ohralik v. Ohio State Bar Ass'n*, which held that a lawyer's solicitation of business for financial gain is only "marginally affected with First Amendment concerns" and may properly be regulated by the states.[165]

Furthermore, all lawyers are bound by the Code of Professional Responsibility, which forbids engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation."[166] Naturally, this prohibition extends to attorneys in class actions and forbids misrepresentations to the class regarding the

---

159. MANUAL, *supra* note 2, at 188. *See also* note 3 *supra*.

160. *See* notes 91-95 & 131-38 and accompanying text *supra*.

161. *See* note 57 and accompanying text *supra*.

162. *See* note 3 *supra* (emphasis added); MANUAL, *supra* note 2, at 188. Even this provision would have failed under the Fifth Circuit's analysis, which held that even as a subsequent restraint the order was constitutionally invalid due to its vagueness and overbreadth. 619 F.2d at 477 n.33.

163. *See* note 57 and accompanying text *supra*.

164. *See* notes 131-38 and accompanying text *supra*.

165. 436 U.S. at 459.

166. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(4) (1979).

status or the effect of the suit. In Disciplinary Rule 7-104, the Code also prohibits defense counsel from communicating with a party known to be represented by a lawyer, and cautions lawyers to advise a party of adverse interest who is not represented by a lawyer, to seek counsel.[167] Once a class has been certified and a member chooses to remain in the class, that member is represented by the class counsel. Since DR7-104 prohibits a defense attorney from communicating with a party of adverse interest who is represented by counsel, an attorney for the defense who attempted to misrepresent the status or effect of the suit to an actual class member would be sanctioned for violating not only the Code sections prohibiting misrepresentation but DR 7-104 as well.[168] The Code accomplishes what the suggested order attempts to do and does so without imposing a blanket unconstitutional prior restraint.

CONCLUSION

By failing to recognize the clear record of abuse and issuing a nonconstitutional decision, the Supreme Court has compounded the confusion among the circuits regarding class action litigation. District courts are still free to impose communication bans in class actions. Even though these orders resemble none of the exceptions to the rule against prior restraints previously articulated by the Supreme Court,[169] the Court's decision in *Bernard* allows these orders to enjoy that status. Fortunately, the Fifth Circuit's reasoning in *Bernard* is being adopted by more district judges who recognize that these communication bans are invalid prior restraints.[170] Furthermore, some district courts whose local rules contained orders modeled on the order suggested by the *Manual* have vacated or amended those rules for the reasons expressed by the Fifth Circuit in *Bernard*.[171] These courts recognize that the potential for abuse in class actions is minor in comparison to the first amendment dangers posed by such blanket orders and that such abuses can be regulated by other means.

---

167. *See* text accompanying note 48 *supra*. *See also* note 50 *supra*.

168. *See* note 48 *supra*. In promulgating the *Bernard* decision, the Fifth Circuit drew no distinction between pre and post-certification communications between the counsel or parties and the class members. At present, it is unclear whether DR 7-104 would prevent defense counsel from communicating with class members either (1) prior to class certification or (2) after certification but prior to the members' decisions on whether to remain in the class. The *Impervious Paint* court held that between the filing of the class action and the close of the opt out period once certification is granted, defense counsel must treat plaintiff class members as represented by the class counsel and conduct themselves accordingly. *See* note 50 *supra*.

169. *See* notes 118-30 and accompanying text *supra*.

170. Kilgo v. Bowman Transp., Inc., 88 F.R.D. 592 (N.D. Ga. 1980); Garside v. Everest & Jennings, No. S-80-82 MLS (E.D. Cal. 1980). Even the drafters of the *Manual*, in the 1981 draft of the proposed new *Manual*, have not abandoned their 1977 observation that "generally, the experience of the courts in class actions has been favorable. . . . [A]buses are the exceptions in class action litigation rather than the rule." 1981 DRAFT—MANUAL FOR COMPLEX LITIGATION, at 75.

171. The following local district court rules have been vacated or amended in light of *Bernard*: N.D. Ill. 22; D. Md. 20; and M.D. N.C. 17(b)(6).

For the present, the Supreme Court has avoided the task of analyzing the constitutionality of blanket communication bans in class actions. When the Court is again presented with the opportunity to rule in this area, the Court could have no finer model upon which to base its reasoning than the Fifth Circuit's scholarly decision in *Bernard*. The Supreme Court may then realize, as did the Fifth Circuit, that the true abuse of the class action device arises not from communication between counsel and the class, but from the imposition of blanket communication bans upon constitutionally protected speech. Supreme Court precedent on prior restraints served as the Fifth Circuit's guide when it issued its decision. If the Court allows itself to be guided by its past decisions, it too will recognize that blanket communication bans, like that suggested by the *Manual for Complex Litigation*, clearly violate the first amendment and disrupt the entire class action process.

Mary Dempsey